MOTION FILED
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IN THE

Supreme Court of the United States

October Term, 1981

Docket No. *80-2043*

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM,

Petitioners,

— against —

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI.

Respondents.

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

and

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

by

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MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

In accordance with Rule 36 of the Supreme Court of the United States, the National Association of Secondary School Principals, by its attorney, respectfully petitions the Court for leave to file a brief, *amicus curiae*, in the above titled action. The grounds for this petition are as follows.

This dispute involves important legal issues affecting public education in the United States. First, the case squarely presents the question of the degree to which the First Amendment rights of students may justify interference with the legitimate authority of local school boards and their designated administrative staff to carry out their responsibilities. Second, the case involves the important question of whether, and to what degree, our public schools are to be permitted to serve the

function of transmitting values supported by the majority of the citizens of the local community.

Petitioners consented to the filing of a brief, *amicus curiae*, but advise us that such consent would not be given by the respondents, therefore necessitating this motion.

I INTERESTS OF PETITIONER GENERALLY

The National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 35,000 administrators of public and private secondary schools throughout the United States. NASSP was organized in 1916 to provide a spokesman for secondary school administrators in the formulation of all aspects of educational policy in the United States and to improve programs for students enrolled in these schools. Although NASSP customarily does not seek to intervene in private litigation, it believes that this case involves issues of such fundamental public importance as to make an expression of its views essential.

The NASSP is committed to the improvement and strengthening of secondary education. It seeks to be responsive to changes both in school environment and in the role of education in society. It promotes research and development in curriculum standards and course content. It seeks to develop higher standards and qualifications for secondary school administration through professional intern and improvement programs. It seeks to focus attention on national educational problems by providing leadership services to its members and information to the general public. NASSP is organized exclusively for educational and charitable purposes.

In the course of its professional activities, the NASSP believes that it has acquired substantial background and knowledge which may not be adequately provided by the parties to this case. Petitioners believe that such background knowledge and information is essential for a fair and expeditious consideration of the issues of this case, and that it represents a perspective and point of view which corresponds with the public interest.

II SPECIFIC INTEREST OF PETITIONER IN THIS CASE

The NASSP does not deny—indeed, it strongly affirms—the proposition that secondary school students, like all other American citizens, have basic rights under the United States Constitution. It is equally our belief, however, that those rights, again like those of all other Americans, are not without limits.

The NASSP further believes that failure to recognize such limitations upon student rights as may be necessary to assure the proper and efficient conduct of public education can only result in a loss of faith in, and withdrawal from the schools, of the public support and confidence upon which they depend.

If respondents prevail in the present case, we believe that these dire effects may well be enhanced. And if these issues are not addressed and resolved at the highest level of our judicial system, the resulting confusion and uncertainty can only produce similar results by encouraging further attempts to challenge school board authority throughout the country.

The NASSP is aware that many special interest groups are involved in a carefully planned and coordinated effort to change the fundamental nature of public education in the United States through the use of constitutional arguments in the courts. The NASSP believes that these constitutional questions can be adequately considered only if the Court has before it information regarding the problems of professional school administration and public education which surround and give substance to those questions of law. It believes that such information and background may not be fully provided by the parties.

III NO ADDITIONAL BURDENS WILL BE PLACED UPON THE COURT OR THE PARTIES

If this motion is granted, there will be no added burdens placed upon the Court, and the parties will in no way be

prejudiced. The NASSP does not seek to delay the proceedings, nor to take the time of the Court or of petitioners for oral argument. It merely seeks leave to submit a brief regarding questions of law affecting the issues before the Court. In so doing, it will, of course, fully comply with the rules of the Court and any other requirements which the Court may impose in order to prevent delay or prejudice to the interests of the parties.

It is therefore respectfully urged that certiorari and this motion be granted, and that the brief of the National Association of Secondary School Principals as *amicus curiae* be accepted by the Supreme Court of the United States.

Respectfully submitted,

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June 22, 1981

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amicus curiae, the National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 35,000 administrators of public and private secondary schools throughout the United States. NASSP was organized in 1916 to provide a spokesman for secondary school administrators in the formulation of all aspects of educational policy in the United States and to improve programs for students enrolled in these schools. Although NASSP customarily does not intervene in private litigation, it believes that this case involves issues of such fundamental public importance as to make essential an expression of its views. A more complete statement of NASSP's interest in this case, together with a description of the background and activities of NASSP, are included in NASSP's Motion for leave to file this brief as *amicus curiae*.

SUMMARY OF FACTS

Few of the facts of this case are in dispute. Following attendance at a meeting sponsored by an admittedly conservative group concerned about public education, several members of the defendant Board of Education recommended review of the Senior High School Library to see whether some of the books which had been brought to their attention as objectionable were represented there. Upon finding that they were, a review process was established in which a Committee was established made up of members of the high school staff and of the community at large. This Committee examined the books involved, and made recommendations to the Board. The Board in turn reviewed the Committee's recommendations, followed some, and refused others.

Ultimately, after having read all of the books involved, the Board ordered that a number of the books be removed from the library, and others to be made available only on a restricted basis. The reasons for these actions and the objections which led up to them are not as easy to characterize in a manner agreeable to both parties. Petitioner Board members claim that their primary objections were to vulgarity, obscenity, religious slurs, and general bad taste. The respondents claim that the real motives were political and social disagreement with the positions espoused by the authors.

The Board members further contend that their motives are to preserve and support the prevailing moral and ethical values of the community through its public schools. The respondents imply that it is rather the desire of the Board to indoctrinate students with the Board members' own views.

It is these issues which would have to be determined by the federal district court if the case is remanded pursuant to the Second Circuit's order.

ARGUMENT
I

Petitioners have both the legal authority and the responsibility to remove books from its libraries for adequate substantive reasons.

No one contests that the Island Trees School Board has the authority and responsibility to establish and control the educational program in the schools of the district.

This is the clear intent and purpose of the Legislature as stated in Section 1709 of the Education Law of the State of New York. Among the specific powers and duties prescribed are: establishment of the course of study, selection of the textbooks to be used, and control of "the books, apparatus, and all school property within its district." (Subsection 9). The Board is further granted:

> ". . . the superintendence, management and control of said union free schools . . ." (Subsection 13) and,

"the superintendence, management and control of the educational affairs of the district, and therefore shall have all the powers reasonably necessary to exercise powers granted expressly or by implication by this chapter or other statutes." (Section 33).

There can be no doubt from the quoted language of the statute that it was the Legislature's clear intent that the local School Board have full control of the educational process within the publicly supported schools of its district. The courts and the state Commissioner of Education have so held on innumerable occasions.*

A. The school library and its contents are a fundamental part of the school's educational program, subject to the control of the Board.

This assertion would seem almost self-evident, but in any event should be accepted by both parties to this suit inasmuch as it was accepted as true even by the Sixth Circuit in *Minarcini v. Strongsville City School District*, 541 F2d 577 (6th Circuit) 1972, upon which respondents have placed major reliance.

B. If the School Board has the authority to select books for its libraries, it must have the equal power to remove them for good reason.

This assertion would also seem, at first glance, to be self-evident, but it was on this point that the Sixth Circuit disagreed. Apparently, in a misplaced reliance upon the so-called "public forum" theory, the court held that once the Board had allowed a book to be placed in the school library, it could not be removed for any substantive reason, or at least for any reason which might be based upon any social or political beliefs of the Board members. But no cases can be cited in which the mere

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*See, for example, *Matter of Serverski*, 7th Ed. Dept. Rep. 79 (1967) upholding board's discretion in re specific courses of instruction; *Matter of White*, 33 St. Dept. Rep. 229 (1925) sustaining board decision to abolish a high school, and particularly *Matter of Kornblum*, 70 St. Dept. Rep. 19 (1949) in which the Commissioner of Education upheld the board's authority to discontinue subscription to a periodical.

purchase of materials by a school or other institution has been considered to be the establishment of a public forum.

In every case prior to *Minarcini* in which this doctrine has been applied, the issue has involved the right of plaintiffs to *express themselves*, either orally or in writing. *Pliscou v. Holtville Unified School District*, 411 F. Supp. 842 (S.D. Calif.) 1976; *Trujillo v. Love*, 322 F. Supp. 1266 (D. Colo.) 1971. It is our belief that the application of such a doctrine to the mere purchase of a book for the school library is so great a change from the original intent as to distort it beyond recognition. Were it to be accepted, it would be difficult for boards even to change textbooks, unless such changes could be in some way justified to any complainant. And what of course offerings? Would the elimination of a French class require proof that the Board had no anti-Gallic motive? In short, to apply this doctrine in the case at bar is to reverse the burden of proof, requiring the school district in every case to prove absence of improper motive if it would make any change in the educational program of the school. Clearly, this has never been contemplated by either the legislature or the courts.

C. Removal of books by the Board from school libraries under its control infringes no constitutional right of student respondents.

Respondents have argued that petitioners' actions in removing certain books from the school library have interfered with their constitutional rights under the First Amendment to the United States Constitution. But no such right has been evidenced. Certainly, a right to freedom of speech, even within school classrooms has been recognized for students. *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). And it can be admitted that the bounds of freedom of expression have been considerably expanded in recent years. But all of the cases cited by respondents in support of their current argument seem clearly distinguishable. Except for *Minarcini* and its progeny, none involved schools or student rights, and all involved situations in which the information sought by plaintiffs was unavailable from any other source. (*Procunier v. Martinez*, 416 U.S. 396 [1974], and *Virginia State Board of*

Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 [1976].) Nevertheless, in *Minarcini*, and the decisions which have followed it, the fact that the publications involved were available to students elsewhere than the school library was not regarded as relevant.

As so well stated by the Second Circuit in *President's Council, District 25 v. Community School Board No. 25*, 457 F. 2d 289 (1972):

> "To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept."

Even if the broadest interpretations are placed upon the concept of free expression, it is time for the courts to recognize that the dimensions of the "marketplace of ideas" protected by the Constitution must vary when applied to minor children of different ages, and a proper distinction recognized between activities occurring within schools and without. The Seventh Circuit recognized this necessity in its recent decision in *Zykan v. Warsaw Community School Corporation*, 631 F2d 1300 (1980). After agreeing that:

> "Secondary school students certainly retain an interest in some freedom of the classroom, if only through the qualified 'freedom to hear' that has lately emerged as a constitutional concept; see *Virginia Pharmacy Board v. Virginia Citizens Consumers Council*, 425 U.S. 748,"

the court stated:

> "But two factors tend to limit the relevance of 'academic freedom' at the secondary school level. First, the student's right to and need for such freedom is bounded by the level of his or her intellectual development. A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices. Second, the importance of secondary schools in the development of intellectual faculties is only one part of a broad formative

role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community." (631 F. 2d 1300, 1304.)

II

Local school boards have both the authority and the legal obligation to establish and enforce some minimum standards of morality in the public schools under their jurisdiction.

We believe that the arguments offered above offer more than sufficient justification for reversing the majority decision of the Court of Appeals, and for sustaining the authority of the school board in its proper exercise of control of the contents of the school library.

We would additionally offer one more argument, however, because we believe that it underlies all of the issues involved in this case, and because of its importance to the members of the *amicus* NASSP. Recently, educational journals have been full of discussions of the appropriate place of values education in the public school. One report, for example, entitled "Values Education," ERS Information Aid, Educational Research Service, Arlington, Virginia, (1976) lists 225 entries in a "selected bibliography" of educational articles on this subject. Also in 1976, in a national conference co-sponsored by the U.S. Department of HEW and our own Association, values education was regarded as a major topic. (See "Values Education" Back to a Basic," in *New Dimensions for Educating Youth: A Report of America's Secondary Schools*, U.S. Government Printing Office; 1976.)

While there is much room for argument about the administrative aspects of the subject, there seems little question that every possible legal source of authority *requires* that at least some minimum moral standard be established and maintained by the board or other governing body of public school districts.

In Massachusetts, for example, when the very first public schools in our country were established, the preamble to the Constitution of the Commonwealth included this statement concerning the purpose of the public schools:

"Wisdom and knowledge, *as well as virtue* . . . being necessary for the preservation of their [the people's] rights and liberties . . . it shall be the duty of legislatures to cherish the interests of literature and the sciences . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humor, and all social affectations [and] generous sentiments among the people" (Emphasis added.) Massachusetts Constitution, Chapter 5, Section 2."

The state's statutes are even more precise, mandating that "full and satisfactory evidence of their moral character" be required of those associating with children and youth in our schools. They further charge instructors to impress on the minds of these same children and youth the:

". . . principles of piety and justice, and a sacred regard for truth, love of their country, humanity, and universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, and those other *virtues which are the ornament of human society* and the basis upon which a republican constitution is founded. . . ." (Chapter 71, Sec. 30. Mass. General Statutes.) (Emphasis added.)

These constitutional and statutory mandates derive from the very nature of the public school system, a system established for the public purpose of preparing all children to participate in, and assume the burdens of citizenship. As one authority states:

"The state finds its right to tax for the maintenance of a system of public schools in its duty to promote the public welfare, the good order and peace of society. The primary function of the public school, in legal theory at least, is not to confer benefits upon the individual as such. The school exists as a state institution because the very existence of civil society demands it." *The Courts and the Public Schools*, by Newton Edwards, 3rd Ed., pp 23–24 op. cit. See also *Bissell v. Davison*, 65 Conn. 183; *Scown v. Czar-*

necki, 264 Ill. 305; *Fogg v. Bd. of Ed.*, 76 N.H. 296.

These broad assumptions, though long accepted in our society, require reaffirmation as they are sometimes forgotten in the desire to achieve other objectives. This seems to be the situation in the present case. If public schools are to serve public purposes, they must be administered in a manner that is responsive to the public which they serve and upon which these schools depend for their very existence. One of the expectations of that public, we would urge, is the establishment and maintenance of standards—both moral and intellectual—satisfactory to the state and the local community.

There can be little question of what the general public wants. In the 8th Annual Gallup Poll of the Public's Attitude Toward the Public Schools, respondents were asked which of the qualities most important in the overall development of children were most neglected by parents today. They picked "high moral standards." And when asked which was most neglected by schools today, they again picked "high moral standards" most often.

Regarding "moral development" in another question, nearly seven out of ten parents of children in public schools said they want the schools to share with them in the responsibility for the moral behavior of their children. (*Phi Delta Kappan* Magazine, October 1976.)

In a speech made shortly before leaving office in 1975, then U.S. Commissioner of Education, Terrel Bell, now Secretary of the Department of Education, observed that parents "have a right to expect that the schools . . . will support the values and standards that their children are taught at home. And if the schools cannot support those values they must at least avoid deliberate destruction of them."

It is the job of the school board, selected by the local community and empowered by the state legislature to decide just what standards meet the expectations of the local community. If its members fail to do so, they are subject to removal by orderly governmental process. All of this is so basic, so fundamental, so elementary to an understanding of American education that we hesitate to discuss it here. Unfortunately, it seems

necessary because of legal challenges like that now before this Court.

In the guise of a constitutional First Amendment right the respondents have sought to substitute their judgment of what is appropriate, for that of the duly selected local school board. In so doing, respondents reach some truly paradoxical results—that books selected and placed in a school library by a librarian or teacher employed by the school board cannot be removed by that board itself; that books which the board seeks to remove can only be removed for non-substantive reasons, presumably that they are damaged, worn-out, or, possibly, out of date.

Certainly, this cannot be the intent of the law.

In the *Zykan* opinion, cited previously, the Seventh Circuit makes the appropriate legal principle crystal clear. Speaking of the scope of the power vested in local school boards, the court states:

> "This grant of broad discretion specifically means that there are only limited constitutional constraints on the form and content of decisions of local school boards acting within the bounds of their statutory powers. Educational decisions necessarily involve choices regarding what students should read and hear, and particularly in light of the formative purpose of secondary school education, local discretion thus means the freedom to form an opinion regarding the instructional content that will best transmit the basic values of the community. As a result, it is in general permissible and appropriate for local boards to make educational decisions based upon their personal, social, political, and moral views. *Cary v. Board of Education*, 598 F. 2d 535, 544 (10th Cir. 1979)." (631 F 2d 1300, 1305.)

III

The values accepted by the majority of the community are an appropriate basis for the local educational program.

In attempting to establish and maintain a moral and ethical basis for the educational program in a public school system, the

local board must necessarily choose some values over others. Clearly, the board member-petitioners in this case looked to the local community for these values. Whether this is the best source of such values should not be an issue for the courts to decide. All it need find is that it is an appropriate source of such values.

Numerous cases so indicate. In a typical case involving teacher dismissal for immorality, for example, the evidence showed that a male teacher had discussed sexual subjects with female students on a number of occasions unrelated to his teaching responsibilities. In upholding the teacher's dismissal, the court said in part:

> "Discussion of sexual subjects is a matter of particular sensitivity in society in general and when such discussion becomes part of a course of conduct by an individual, such conduct may be perceived by others as either amoral or immoral. . . . Where a teacher engages in such discussions outside the context of a classroom or a pedagogical setting, a school board, viewing these actions against the moral standards of the community, might well conclude that such conduct exceeds the bounds of propriety and fails to give students the proper guidance as to morals and standards of conduct which teachers should foster and encourage in their students. Such a finding is all that is necessary to deprive a teacher of the privilege of teaching children on the grounds that his conduct offended the moral standards of the community and set a bad example to the youth under his charge." *Penn-Delco School District v. Urso*, 382 A. 2d 162 (1978).

If the moral standards of the community are a sufficient standard by which to sustain the termination of a tenured teacher, there should be little doubt that these same community standards are an appropriate basis for action by the school board in the selection and maintenance of material for inclusion in its libraries.

Indeed, the fact that the petitioning board members are elected to their positions by that community creates a situation in which it should be expected that the members of the board

must reflect the moral values of the citizens who chose them. Admittedly, the community does not speak with one voice, and the board is bound to try to select those voices which are in the majority—not by law—but by the rules of political life. If they fail to do so, they will not be returned to their positions. In the instant case, however, five of the six board members who are petitioners have been successfully re-elected since the actions were taken upon which the respondents based their suit. (The other member did not choose to seek re-election.)

Contrary to the contention of respondents, it can be argued that it is the very failure of school boards to be willing to inculcate strongly-held community values which has led to the decline in support of public schools by the citizenry. Figures released by the National Center for Education Statistics indicate that private schools are holding their enrollment levels even for the past decade, in spite of an annual decline of more than one percent in the total school-age population, and serious economic pressures on parents occasioned by an inflation rate which continues to outpace income gains for most wage-earners.

Certainly there can be many reasons for the decisions of parents to transfer their children from public to private schools. But the previously quoted results of Gallup polls of attitudes toward public education suggest that the issue of moral standards may well be one of them.

IV

Even if removal of the library books at issue were based on matters of personal taste, the federal courts should not interfere with the proper exercise of authority by a local school board in the administration of its duties, absent a clear showing of impropriety.

There would seem to be little need for detailed explication of this point in our argument, and yet it seems to have been overlooked by the majority of the Second Circuit in its remand order. As Justice Frankfurter so ably expressed it in the famous flag salute case:

". . . the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideas of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). Reversed on other grounds by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

On the specific subject of book selection these principles were clearly supported by the Tenth Circuit in *Cary* (cited supra) in which teachers claimed that their academic freedom was abridged when the school board prohibited the use of ten books in certain elective classes. The court recognized the authority of the board to remove the books even if its decision was educationally "wrong" or influenced by personal views of the board members, so long as there was no showing that the action was intended to promote a particular religious viewpoint, or to exclude any particular kind of thought. Similar conclusions were reached by the Seventh Circuit in *Zykan* (supra) regarding the removal of books from the school library.

And, in the very similar case of *Bicknell v. Vergennes Union High School Board of Directors*, 638 F2d 438 (2nd Cir. 1980), decided on the same date as the case now before this Court, the Second Circuit dismissed the plaintiff's complaint as having no legal basis so long as the board could reasonably conclude that the materials removed were vulgar or indecent.

The record in the case before this Court clearly indicates that these same objectives were the basis of petitioners' actions, and the selections from the books removed, fully cited in Judge Mansfield's dissenting opinion, more than adequately support the explanation given by the petitioners that ". . . the books . . . contain material that is offensive to Christians, Jews, Blacks, and Americans in general. In addition, these books contain obscenities, blasphemies, brutality, and perver-

sion beyond description." Nothing in the record would provide a basis for concluding that petitioners' actions were motivated by the kinds of impropriety cited in *Zykan* as inappropriate. The school boards and administrators of our public schools cannot be expected to perform their important and difficult jobs if they must bear the burden of persuasion which the majority of the Second Circuit would place upon them.

This Court's admonition in *Minersville* (supra) is not out of date. It was effectively repeated just a few years ago. Speaking for the Supreme Court, Justice White warned:

> "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. . . . The system of public education that has evolved in this nation relies necessarily upon the discretion and judgment of school administrators and school board members, and Section 1983 [Civil Rights Act of 1871] was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violation of specific constitutional guarantees." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

We sincerely believe that the arguments presented in this brief demonstrate that there has been no clear violation of respondents' constitutional rights in the case at bar.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari to review the judgment and opinion of the Second Circuit should be granted.

Respectfully submitted,

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June 22, 1981